

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
APPLICATIONS OF AMERITECH CORP.,)	CC Docket No. 98-141
TRANSFEROR,)	
)	
and)	
)	
SBC COMMUNICATIONS INC.,)	
TRANSFeree,)	
)	
For Consent to Transfer Control of Corporations)	
Holding Commission Licenses and Lines Pursuant)	
to Sections 214 and 310(d) of the Communications)	
Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of)	
the Commission's Rules)	

ORDER

Adopted: July 7, 2010

Released: July 8, 2010

By the Commission:

I. INTRODUCTION

1. In this Order, we address a request for a refund of certain payments made by SBC Communications, Inc. ("SBC") pursuant to conditions established as part of the SBC-Ameritech merger proceeding.¹ SBC² argues that a subsequent independent audit has established that it erroneously exceeded the required payments, and that therefore it is due a refund of a portion of these fees.³ Upon analysis of the auditor's report and the associated work papers, we agree that a credit is due in the amount of \$216,975 and grant SBC's request. Accordingly, we reduce SBC's combined payments by \$216,975, and direct our Office of Managing Director to provide a refund to SBC of that amount.

¹ *Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules*, CC Docket No. 98-141, Memorandum Opinion and Order, 14 FCC Rcd 14712 (1999) ("SBC-Ameritech Merger Order").

² SBC merged with AT&T Corp. effective November 18, 2005 and adopted AT&T Inc. as the name for the combined entity. *See, e.g., SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, WC Docket No. 05-65, Memorandum Opinion and Order, 20 FCC Rcd 18290 (2005). For the sake of clarity, however, we shall continue to refer to the Petitioner as "SBC" for the remainder of this Order.

³ Letter from Joan Marsh, Vice President—Federal Regulatory, AT&T Services, Inc., to Anthony Dale, Managing Director, FCC, dated January 15, 2009 ("Jan. 15, 2009 Letter").

II. BACKGROUND

2. On October 8, 1999, the Federal Communications Commission (“FCC” or “Commission”) approved, subject to explicit conditions, the transfer of licenses and lines from Ameritech Corp. (“Ameritech”) to SBC in connection with the merger of the two companies.⁴ To offset the potential harms arising out of the merger, SBC proposed, and the Commission adopted, a series of conditions intended to enhance local competition and to strengthen the incentives of SBC to expand competition outside its territories (the “Merger Conditions”).⁵

3. One of these Merger Conditions, known as Condition VII, required SBC to file publicly monthly performance measurement data under a Carrier-to-Carrier Performance Assurance Plan (“Performance Plan”).⁶ The Performance Plan required SBC to report, on a monthly basis, its performance in 20 different categories or metrics that were broken down into sub-metrics and that addressed functions that could affect SBC’s local competitors and their customers.⁷ These categories covered key aspects of pre-ordering, ordering, provisioning, maintenance and repair, and billing associated with unbundled network elements (“UNEs”), interconnection, and resold services.⁸ Under the Performance Plan, SBC was required to make voluntary payments to the U.S. Treasury if it failed to meet the performance standards established in the Plan, up to a maximum of \$1.125 billion over three years.⁹ Such payments were voluntary performance measurements payments and not fines, penalties, or forfeitures.¹⁰

4. In addition, Condition XXVII of the SBC-Ameritech Merger Order required SBC to engage annually an independent auditor to examine SBC’s compliance with the Merger Conditions.¹¹ The annual audit was intended to provide a thorough and systematic evaluation of SBC’s compliance with the Merger Conditions and the sufficiency of SBC’s internal controls.¹²

5. Soon thereafter, however, the Commission became aware of inaccuracies in the data submitted by SBC to demonstrate compliance with the Merger Conditions. On March 15, 2001, the Enforcement Bureau issued an Order of Forfeiture for SBC’s failure to report certain performance data in its monthly performance reports in accordance with published business rules in the Performance Plan.¹³ The Enforcement Bureau ordered SBC to forfeit \$88,000 for data inaccuracies submitted by SBC for the period from January through November 2000.¹⁴

⁴ See SBC-Ameritech Merger Order, *supra* n.1.

⁵ *Id.* at 14854-14925, paras. 348-518.

⁶ *Id.* at 14999-15001, paras. 23-24.

⁷ *Id.*

⁸ *In the Matter of SBC Communications, Inc.*, File No. EB-02-IH-0382, Order, 18 FCC Red. 4997, 4999, para. 3 (2003) (“Consent Decree”). The 2003 Consent Decree provides a concise summary of the scope of the relevant provisions of the SBC-Ameritech Merger Order, and we cite it here for clarity. See *infra* para. 8.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 4999, para. 4.

¹² *Id.*

¹³ *Id.* at 4999-5000, para. 5.

¹⁴ *Id.*

6. Despite these forfeitures imposed by the Enforcement Bureau, the errors continued. On August 30, 2002, Ernst & Young (“E&Y”) completed its audit report addressing SBC’s compliance with certain of the merger conditions from January 1, 2001 through December 31, 2001 (“2002 Audit Report”).¹⁵ The 2002 Audit Report stated that certain of the data in SBC’s monthly performance filings contained performance reporting errors, and noted a variety of causes of such errors, primarily involving programming and data entry errors, incorrect classification of data, and improper inclusion and omission of certain data from calculations.¹⁶ This was notable because errors in performance reports could affect the amount of SBC’s voluntary payments for failing to meet performance levels specified in the Performance Plan.¹⁷ SBC subsequently reported to the Commission similar performance reporting errors and restatements in reports filed for the January 2002 through February 2003 time period.¹⁸

7. These performance reporting errors in the 2001-2002 time frame served to highlight the difficulty of ensuring the accuracy of SBC’s filings. On that point, SBC asserted to the Commission that, despite its best efforts, some material and immaterial data discrepancies were inevitable, primarily as a result of the “sheer volume and complexity of the data” that were required to be “collected, reviewed and reported and the short timeframe in which the monthly performance reports had to be prepared.”¹⁹

8. In a Consent Decree released on March 20, 2003, SBC settled these issues with the Commission.²⁰ As part of the Consent Decree, SBC agreed to establish a formal compliance plan (“Compliance Plan”), which incorporated ongoing data review and validation of the integrity of the data that it was required to report monthly to the Commission pursuant to the Performance Plan.²¹ As part of the Compliance Plan, SBC agreed to establish a “True-Up Process,” whereby:

SBC will establish a process for performing a true-up of any errors in the calculation of any voluntary payments required under the Performance Plan no later than 90 days after the Effective Date of this Consent Decree. No later than 180 days after the Effective Date of this Consent Decree, SBC will apply its true-up process to any errors for the performance measurement reports filed in the twelve-month period immediately preceding the date of this Consent Decree.²²

9. The “True-Up Process” ultimately developed by SBC consisted of two primary components. First, if the True-Up Process revealed an underpayment of voluntary contributions based on reports filed in the previous twelve months, SBC would wire the additional funds to the appropriate FCC account. Second, if the True-Up Process revealed an overpayment, SBC would simply subtract this

¹⁵ *Id.* at 5000, para. 6.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 5004-05.

²² *Id.* at 5005, sec. 3.

difference from the next scheduled voluntary contribution, and carry over any excess to future periods.²³

10. On September 1, 2005, SBC filed the August 29, 2005 audit report of E&Y (“2005 Audit Report”), pursuant to the terms of the Merger Conditions.²⁴ In this report and the associated work papers, the auditor concluded a credit was due to SBC for the agreed upon true-up of restatements to previous performance measure plan payments in 2003 and 2004.²⁵ Specifically, the audit work papers stated:

The true-ups made for the 2003-2004 performance period appears [sic] to be calculated appropriately in accordance with the business rules, performance plan, and merger conditions. E&Y noted no exceptions in performing the above procedures. E&Y concludes that the data calculations and schedules provided by SBC are reasonable. In addition, it is deemed correct based on the data and the information presented that SBC should receive a refund in the amount of \$216,975 for the True-up.²⁶

11. On January 15, 2009, after prior informal negotiations with the FCC failed to bring a resolution to this matter, SBC formally submitted a request for a refund of the disputed charges.²⁷

III. DISCUSSION

12. Based upon the specific facts and circumstances in the record before us, we conclude that the voluntary payments made by SBC in compliance with the Merger Conditions should be reduced by a total of \$216,975. Through our review of the audit reports and associated work papers filed by SBC’s independent auditor E&Y, we are persuaded that SBC miscalculated its financial obligations due under the Merger Conditions, ultimately resulting in an overpayment to the U.S. Treasury of that amount.

13. In reaching this conclusion, we independently reviewed E&Y’s professional opinion in this matter. As SBC’s independent auditor, E&Y was tasked with examining SBC’s compliance with the merger conditions. E&Y has certified that its examination was conducted in accordance with attestation standards established by the American Institute of Certified Public Accountants and included examining, on a test basis, evidence about SBC’s compliance with the requirements established in the merger Order and performing such other procedures as were considered necessary in the circumstances.²⁸

14. Our internal auditors employed by our Office of Managing Director independently reviewed E&Y’s audit reports and work papers covering the relevant period, as well as the terms of the Consent Decree. Our auditors have confirmed that all performance measures and obligations due under both the Merger Conditions and the Consent Decree were calculated correctly by E&Y, and concur with E&Y’s conclusions. E&Y’s work indicates that SBC overpaid the U.S. Treasury in the amount of

²³ E-mail from Joan Marsh, Vice President—Federal Regulatory, AT&T Services, Inc., to Warren Firschein, Attorney, FCC, dated July 16, 2009), Attachment A.

²⁴ Jan. 15, 2009 Letter at 2. *See* Letter from Michelle A. Thomas, Executive Director—Federal Regulatory, SBC Services, Inc., to Marlene H. Dortch, Secretary, FCC, dated September 1, 2005, Attachment (“2005 Audit Report”).

²⁵ *Id.*

²⁶ Jan. 15, 2009 Letter at 2.

²⁷ *Id.* at 2 n.3.

²⁸ *See* 2005 Audit Report at para. 2.

\$216,975. Our auditors agree, based on their review of that work that SBC is due a refund of that amount.

15. By its terms, the True-Up Process established by SBC in accordance with the Consent Decree was designed to correct accidental overpayments through an offset to future financial obligations. The overpayments at issue here occurred in the final performance period before the expiration of the Merger Conditions.²⁹ The True-Up Process did not specifically state what would occur in this situation, but a refund of any overpayment that was detected subsequent to the final voluntary payment is consistent with the goals of the True-Up Process and the interim adjustment procedures. We agree that SBC is entitled to relief. The intent of the Consent Decree was to foster accuracy in calculating the extent of future voluntary payments as necessitated by performance reports. This goal pertains as much to overpayments as to underpayments and is duly reflected in the True-Up Process. Because there were no future Performance Evaluation Periods against which the overpayment could be offset, we conclude that SBC is due a refund. We therefore grant SBC's request, and order the Commission's Office of Managing Director to refund \$216,975 to SBC.

IV. ORDERING CLAUSES

16. Accordingly, IT IS ORDERED that, pursuant to Sections 1, and 4(i) and (j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i) and (j), SBC's Request For Refund of Certain Payments Pursuant to True-Up is HEREBY GRANTED.

17. IT IS FURTHER ORDERED that the Commission's Office of Managing Director refund \$216,975 to SBC at the earliest practicable time.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

²⁹ On that point, the 2005 Audit Report specifically notes that "[t]he current Evaluation Period encompasses [SBC]'s final true-up payment calculation made in September 2004." *Id.* at 3.